No. [redacted]22

OCTOBER TERM, 1915.

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SUPREME COURT U.S.

IN THE

Supreme Court of the United States

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

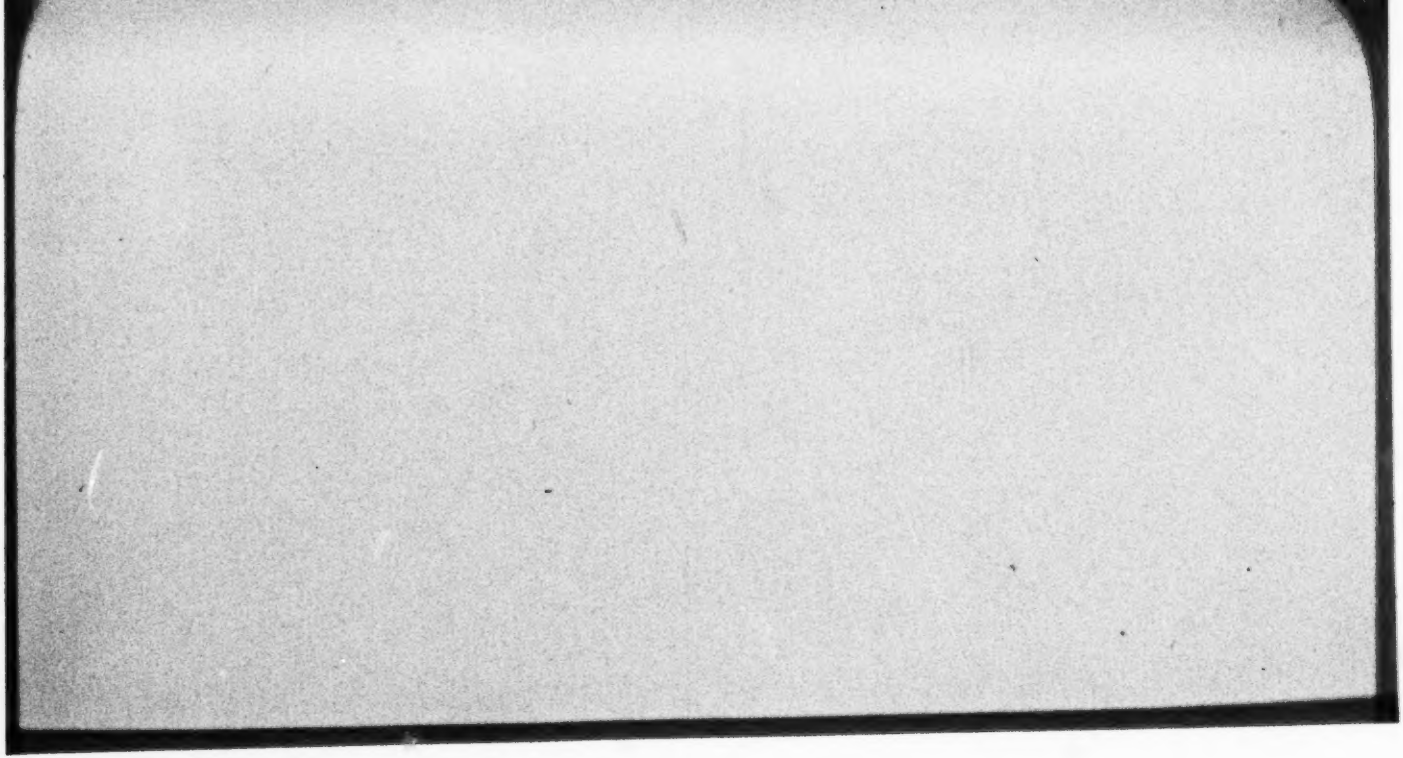
vs.

W. F. JACOBY & COMPANY, Defendant in Error.

On Certificate from and Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

PETITION OF THE PENNSYLVANIA RAILROAD COMPANY FOR A REARGUMENT OF THIS CASE OR FOR A MODIFICATION OF THE JUDGMENT.

FREDERIC D. McKENNEY,
FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Plaintiff in Error.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915. NO. 139.

Pennsylvania Railroad Company, Plaintiff in Error,

vs.

W. F. Jacoby & Company, Defendant in Error.

ON CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION OF THE PENNSYLVANIA RAILROAD COMPANY FOR A REARGUMENT OF THIS CASE OR FOR A MODIFICATION OF THE JUDGMENT.

The Pennsylvania Railroad Company, the plaintiff in error, respectfully petitions the Court to restore this case to the Docket, in order that it may be argued before a full Bench, and assigns the following reasons in support of this petition.

The District Judge, however, declined to instruct the jury that the award was invalid, even though they should find that the defendants in error, had distribution been made of its cars by the plaintiff in error in accordance with the rule prescribed by the Interstate Commerce Commission, would not have received the cars which the Commission found should have been received, and further declined to instruct the jury that if they should find that the Commission reached its conclusion as to the number of cars which the defendants in error should have received with reference to a number received by certain mines, then the basis for the Commission's conclusion and award was an erroneous one, and the defendants in error could not consequently recover the amount of the award.

Another question or issue involved in the present case, the determination of which would have a general application, is this:—

Under the rule of distribution promulgated by it, the Interstate Commerce Commission divided the cars on the lines of the plaintiff in error into two classes, "assigned" and "unassigned," the former comprising the individual cars of shippers and fuel cars of the plaintiff in error and other railroad companies, and the latter all other cars.

The Commission held that the assigned cars were not allottable among shippers generally, the plaintiff in error being bound to place the individual cars at the mines of the owners, and being at liberty to place the fuel cars at whatever mines were furnishing fuel supply coal, and that consequently the only allottable cars were the unassigned cars, but that, in determining the number of these which each shipper was to receive, regard must be paid to any assigned cars which had also been delivered to such shipper.

In the proceeding in which the Commission reached this conclusion an effort was made upon behalf of the

Complainants to have the Commission hold that each shipper was entitled to receive a *pro rata* share of the whole number of cars placed at the mines, including therein both assigned and unassigned cars, but in respect to this the Commission said:—

> "Although the mine owning private cars or to which company or foreign railway fuel cars are consigned is entitled to receive them even though in excess of its ratable proportion of all available coal car equipment, nevertheless the defendant will be required in the future to count all such cars against the distributive share of the mine so receiving them. *It is scarcely necessary to add that the Complainants' second request for a finding and for an order requiring the Defendant during percentage periods to distribute ratably among operators according to the actual output capacity of their mines 'all cars adapted to and used for carrying bituminous coal,' whether company fuel cars, foreign railway fuel cars or private cars, must be denied.*"

But in the present action, in determining the number of cars which the defendants in error should have received, the Commission went directly counter to the view embodied in the extract from its opinion which we have just quoted, for it determined the number of cars which the defendants in error should have received with reference to the number which certain selected mines had received, notwithstanding the fact established by the witnesses of the defendant in error, that included in the cars which had been placed at these mines were individual and fuel cars, and by so doing the Commission in effect held that the proper share of the defendants in error was their ratable share of all the cars distributed, *whether company fuel cars, foreign railway cars or private cars.*

If it be granted, as it must be, that a uniform rule or method of distribution is essential to avoid a preference

and discrimination forbidden by the Interstate Commerce Act, it would seem to be quite as essential that whatever rule is established should be uniformly applied not only by the carrier in making distribution, but by any tribunal which may be required to subsequently determine what the carrier was required to do in order to properly apply the rule to the actual distribution made by it.

There is involved in the present case also another proposition of law, the determination of which by this Court is most desirable.

Upon the argument of this case and in their brief the defendants in error, in seeking to uphold the conclusion or finding of the Commission as to the number of cars which they should have received, advanced the contention that this conclusion or finding was administrative in character and consequently not open to review by a Court.

This contention, in view of the decision of this Court in the Morrisdale case, can hardly be considered as sound, but in view of the other cases pending in which doubtless a like contention will be advanced, it is most desirable that this Court should in the present case determine whether it is or is not well founded.

Should the Court be of opinion that this case should not be restored to the Docket, then your petitioner prays that the judgment may be modified in the following respects:—

The Record shows an allowance to the defendants in error by the District Court of a counsel fee of $2500 for services rendered in the proceeding before the Interstate Commerce Commission. The plaintiff in error objected to the allowance of this fee, and an exception to the order of the Court making the allowance was granted, and the action of the Court in making such an allowance formed the basis of the Twenty-fourth Assignment of Error (Transcript of Record, page 155).

Under the decision of this Court in the Meeker case, the order in question was improper, and this was conceded upon the argument before this Court. The order allowing this fee should, therefore, be set aside.

FREDERIC D. McKENNEY,
FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Plaintiff in Error.